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Supreme Court of the United States

THE UTILITY SOLID WASTE ACTIVITIES GROUP, ENTERGY SERVICES, INC., MISSISSIPPI POWER COMPANY, AMERICAN ELECTRIC POWER SERVICE CORPORATION, AND GENERAL ELECTRIC COMPANY,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF IN SUPPORT OF JOINT PETITION FOR CERTIORARI

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY BRIEF IN SUPPORT OF JOINT PETITION FOR CERTIORARI	1
I. THE COURT'S DECISION IN *AMERICAN TRUCKING* LEAVES OPEN THE APPLICABILITY OF THE "HARDSHIP PRONG" OF THE *ABBOTT LABORATORIES* RIPENESS TEST WHERE THE TIME FOR REVIEW OF REGULATIONS IS LIMITED BY STATUTE	2
II. THERE IS A CONFLICT AMONG THE COURTS OF APPEALS ON WHETHER RIPENESS REQUIRES HARDSHIP TO THE PARTIES WHERE THERE IS A LIMITED STATUTORY PERIOD FOR JUDICIAL REVIEW	3
III. CONTRARY TO EVERY OTHER COURT OF APPEALS THAT HAS CONSIDERED REGULATIONS ISSUED UNDER TSCA, THE COURT BELOW IGNORED THE PLAIN LANGUAGE OF THE TSCA JUDICIAL REVIEW PROVISION	6
CONCLUSION	9

TABLE OF AUTHORITIES

CASES	Page
Eagle-Picher Indus., Inc. v. *EPA*, 759 F.2d 905 (D.C. Cir. 1985)	3, 4
George E. Warren Corp. v. *EPA*, 159 F.3d 616 (D.C. Cir. 1998)	5
Louisiana Envtl. Action Network v. *EPA*, 172 F.3d 65 (D.C. Cir. 1999)	5
Mississippi Valley Gas Co. v. *FERC*, 68 F.3d 503 (D.C. Cir. 1995)	4
National Recycling Coalition, Inc. v. *Reilly*, 884 F.2d 1431 (D.C. Cir. 1989)	5
Natural Res. Def. Council, Inc. v. *EPA*, 22 F.3d 1125 (D.C. Cir. 1994)	5
Pacific Gas & Elec. Co. v. *State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190 (1983)	4
Rio Grande Pipeline Co. v. *FERC*, 178 F.3d 533 (D.C. Cir. 1999)	5
Whitman v. *American Trucking Ass'ns*, 121 S. Ct. 903 (2001)	1, 2, 3

STATUTES AND REGULATION	
5 U.S.C. § 706(2)(A)	7
15 U.S.C. § 2604(b)(4)(A)	7
§ 2605	7
§ 2617	4
§ 2618(c)(1)(B)(i)	6
63 Fed. Reg. 35,384 (June 29, 1998)	7

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The court of appeals' decision presents two questions that warrant this Court's review: (1) whether a court must consider hardship to the parties when deciding whether a case is ripe for review where the issue presented is purely legal and Congress has prescribed a limited period for judicial review; and (2) whether a court may ignore an express statutory standard of review and apply a more deferential standard based on the court's interpretation of the context of a petition for review of an agency rule.

With respect to the first question, the decision in *Whitman* v. *American Trucking Ass'ns*, 121 S. Ct. 903 (2001), handed down after the petition for certiorari was filed, suggests that a

suit may be ripe for review without a showing of hardship when the petition challenges regulations issued under a statute that specifies a limited period for judicial review. Contrary to the Environmental Protection Agency's argument, a clear split exists between the courts of appeals on this precise question. Because of the prevalence of statutes that specify limited review periods, this question will arise repeatedly. With respect to the second question, Respondent divines "congressional intent" supporting the dual standard of review propounded by the court of appeals, even though that formulation is directly contrary to the plain language of the statutory judicial review provision, and no legislative history suggests that Congress meant anything other than what it said in the statute. The decision below is at odds with that of every other court of appeals which has applied the provision.

I. THE COURT'S DECISION IN *AMERICAN TRUCKING* LEAVES OPEN THE APPLICABILITY OF THE "HARDSHIP PRONG" OF THE *ABBOTT LABORATORIES* RIPENESS TEST WHERE THE TIME FOR REVIEW OF REGULATIONS IS LIMITED BY STATUTE.

According to Respondent, *American Trucking* confirms that "hardship" can be a relevant ripeness consideration where Congress has set time limits for review of agency regulations. Opp. 7-8. In *American Trucking*, however, this Court had before it a record that indicated some hardship to the parties from deferring review. The decision therefore did not decide the question whether a challenge to a regulation under a statute providing a limited period for judicial review may be ripe despite a court's conclusion that hardship has not been demonstrated.

American Trucking cites the proposition that statutes providing for preenforcement review permit immediate judicial consideration without the need to show that petitioner has felt the "'concrete effects'" of the regulatory enactment. *American Trucking*, 121 S. Ct. at 916 (quoting *Lujan* v. *National*

Wildlife Fed'n, 497 U.S. 871, 891 (1990)). But the Court does not explain what showing of hardship, if any, is required in cases involving such statutes. Although the precise formulation of the ripeness standard is left unclarified, at a minimum the Court employs a "lower standard" than applied by the Fifth Circuit below. *Id.* This case affords the Court a perfect opportunity to decide whether congressional specification of a limited period for preenforcement review permits a court to dispense entirely with the consideration of hardship when assessing ripeness.

II. THERE IS A CONFLICT AMONG THE COURTS OF APPEALS ON WHETHER RIPENESS REQUIRES HARDSHIP TO THE PARTIES WHERE THERE IS A LIMITED STATUTORY PERIOD FOR JUDICIAL REVIEW.

Respondent mischaracterizes the District of Columbia Circuit's decision in *Eagle-Picher Industries, Inc.* v. *EPA*, 759 F.2d 905 (D.C. Cir. 1985) and subsequent cases. Opp. 8-11. Respondent's brief dwells on the "fitness for review" prong of *Abbott Laboratories* without acknowledging *Eagle-Picher*'s central holding: where the first prong of *Abbott Laboratories* is satisfied no hardship need be shown so long as the petition involves an issue that is purely legal and is a challenge to a regulation promulgated pursuant to a statute that sets a limited period for judicial review. See *Eagle-Picher*, 759 F.2d at 918.

While Respondent seeks to downplay this holding, in fact, *Eagle-Picher* is the landmark decision in which the District of Columbia Circuit altered the ripeness analysis in cases involving statutes in which Congress has expressed a strong preference for immediate judicial review. In *Eagle-Picher*, the "fitness" prong was satisfied by a finding that the issue presented for review was "a purely legal question and thus was 'fit' in that respect for judicial resolution during the

statutory period." *Id.* at 916.[1] The court concluded that when "the first prong of the ripeness test is met and Congress has emphatically declared a preference for immediate review," the hardship prong need not be considered. *Id.* at 918.[2]

Respondent conflates the two prongs of *Abbott Laboratories* in attempting to show that the District of Columbia Circuit jurisprudence is something it is not.[3] In the District of Columbia Circuit it is settled that where "a petitioner 'raises a purely legal question,'" the court will "assume that issue is suitable for judicial review." *Mississippi Valley Gas Co.* v. *FERC*, 68 F. 3d 503, 508 (D.C. Cir. 1995) (quoting *Eagle-*

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[1] Although Respondent dismisses the benefits of immediate review, Opp. 10-11, there is a positive interest in immediately resolving whether the Mega Rule's repudiation of federal preemption squares with the preemption provision of 15 U.S.C. § 2617 ("TSCA § 18"). Notwithstanding that there may be questions about the extent of exceptions to the provision, preemption is predominantly, if not purely, a legal question. *See Pacific Gas & Elec. Co.* v. *State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 201 (1983). Petitioners seek adjudication of EPA's affirmative regulatory interpretation that TSCA does not preempt state and local PCB disposal rules, a legal conclusion that will immediately affect how states and localities implement PCB regulations, regardless of how particular exceptions may later be construed.

[2] *Eagle-Picher* also implicitly acknowledges that the Article III "case or controversy" requirement may be satisfied even where no hardship to the parties is shown. *See Eagle-Picher*, 759 F.2d at 915, 918.

[3] Respondent's focus on the first prong of the *Abbott Laboratories* test – fitness for review – is also largely irrelevant because the court of appeals below did not specifically address whether that prong was satisfied in this case. Instead, that court restated the law in the Fifth Circuit that requires a showing of hardship and determined only that Petitioners had demonstrated none. Pet. App. 11a. Moreover, despite Respondent's contention that no showing of hardship was made in the court below, Opp. 8 n.1, the court of appeals did in fact have before it Petitioners' concerns of delayed PCB cleanups and protracted state-by-state litigation if the preemption issue was not promptly resolved, as well as examples of state regulations that Petitioners contend TSCA preempts and that could potentially be applicable to Petitioners. Pet. 7 n.4.

Picher, 759 F.2d at 915). That court will accordingly reject an agency's suggestion that a "petition must be dismissed absent a showing of 'hardship.'" *Rio Grande Pipeline Co.* v. *FERC*, 178 F.3d 533, 540-41 (D.C. Cir. 1999).[4] This conflicts squarely with the Fifth Circuit's approach, which requires consideration of hardship regardless of other circumstances. Pet. App. 11a ("This Court has held, however, that even where an issue presents purely legal questions, the plaintiff must show some hardship in order to establish ripeness.")

EPA's analysis involves nothing more than wishing this conflict away. What is absolutely clear is that Petitioners' preemption issue would have been decided on the merits in the District of Columbia Circuit; it was not resolved by the Fifth Circuit; and there is at least a risk that the issue never will be reviewed unless this Court grants the petition.

The significant number of statutes (Pet. 10-11; Pet. App. 47a-59a) that provide for preenforcement review of regulations guarantees continuation of the conflict between these circuits' application of *Abbott Laboratories* until this Court clarifies the relationship between hardship and ripeness in petitions for preenforcement review. This case is the right vehicle to resolve this core procedural issue of administrative review.

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[4] The District of Columbia Circuit has taken this approach to hardship in many other cases decided since *Eagle-Picher*. *See, e.g.*, *Louisiana Envtl. Action Network* v. *EPA*, 172 F.3d 65, 69 (D.C. Cir. 1999); *George E. Warren Corp.* v. *EPA*, 159 F.3d 616, 621-22 (D.C. Cir. 1998); *Natural Res. Def. Council, Inc.* v. *EPA*, 22 F.3d 1125, 1133 (D.C. Cir. 1994); *National Recycling Coalition, Inc.* v. *Reilly*, 884 F.2d 1431, 1434 (D.C. Cir. 1989).

III. CONTRARY TO EVERY OTHER COURT OF APPEALS THAT HAS CONSIDERED REGULATIONS ISSUED UNDER TSCA, THE COURT BELOW IGNORED THE PLAIN LANGUAGE OF THE TSCA JUDICIAL REVIEW PROVISION.

The court of appeals' convoluted justification (which Respondent does no more than parrot) for applying arbitrary and capricious review rather than the substantial evidence standard that Congress expressly specified has no basis in TSCA's text or legislative history. Pet. 21-22; Opp. 11-15. TSCA § 19(c)(1)(B)(i) provides, in full:

> Section 706 of Title 5 shall apply to review of a rule under this section, except that – (i) in the case of review of a rule under section 2603(a), 2604(b)(4), 2605(a), or 2605(e) of this title, the standard for review prescribed by paragraph (2)(E) of such section 706 shall not apply and the court shall hold unlawful and set aside such rule if the court finds that the rule is not supported by substantial evidence in the rulemaking record (as defined in subsection (a)(3) of this section) taken as a whole ....

15 U.S.C. § 2618(c)(1)(B)(i). Except for the decision below, *every* court of appeals that has reviewed a regulation issued under any one of the *four* subsections enumerated in this judicial review provision has followed the plain language and applied a substantial evidence standard. Pet. 17-18.

Respondent attempts to dismiss the inconsistency among the circuits presented in the Petition by asserting that most of the cases cited by Petitioners do not concern PCB regulations. Opp. 14 & n.3. While true, all such cases concern TSCA § 19(c)(1)(B)(i), the provision in dispute here. Since that section contains no exceptions for PCB versus other covered regulations, all decisions construing that section are properly considered in defining a decisional conflict that warrants resolution by this Court.

Among the subsections identified in § 19(c)(1)(B)(i) is TSCA § 6(e), which authorizes EPA regulation of PCBs. 15 U.S.C. § 2605(e). The court of appeals below held that the substantial evidence standard applies only to a challenge to an EPA decision to permit the use or expand the use of PCBs, while the arbitrary and capricious standard applies to EPA rules restricting or prohibiting the use of PCBs. Pet. App. 8a.

The judicial review provision in TSCA § 19(c)(1)(B)(i) is comprehensive, sweeping in several different EPA regulatory powers. Some of these authorizations involve creating exceptions to general prohibitions. See 15 U.S.C. § 2605(e)(2)(B), (e)(3)(B) ("TSCA § 6(e)(2)(B), (e)(3)(B)"). Others involve regulation without a set baseline. See, *e.g.*, 15 U.S.C. §§ 2604(b)(4)(A), 2605(a), (e)(1) ("TSCA §§ 5(b)(4)(A), 6(a), (e)(1)"). Nothing in the judicial review provision distinguishes or subdivides these disparate provisions to supply a standard of review other than substantial evidence. Instead, the section expressly precludes the arbitrary and capricious standard otherwise applicable under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A).

Moreover, TSCA § 6(e)(2) delegates to EPA the power to do only one thing: "authorize the ... use ... of any polychlorinated biphenyls in a manner other than in a totally enclosed manner if the Administrator finds that such ... use ... will not present an unreasonable risk of injury to health or the environment." 15 U.S.C. § 2605(e)(2). EPA relied on this section in promulgating the regulations challenged in this case. See 63 Fed. Reg. 35,384, 35,385 (June 29, 1998). All of the regulations challenged in this case authorize, to some degree, use of PCBs other than in a totally enclosed manner. Nothing in § 6(e) modifies the plain language of the judicial review provision to suggest that the degree of departure from the prohibition should govern the standard of review.[5]

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[5] Respondent's characterization of EPA's decisionmaking here – *i.e.* that EPA rejected industry requests to create or enlarge exceptions to the

The impracticability of applying the dual standard Respondent urges is illustrated by one of the regulations at issue in the Mega Rule petitions. In 1982, EPA authorized storage of PCBs for reuse upon a finding that such use would not present an unreasonable risk of injury to health or the environment. The Mega Rule tightened some of the conditions of storage for reuse but continued to authorize the practice. Pet. App. 13a-14a. The challenged regulations, which continue to permit this use, do not fit either of the review scenarios the court of appeals envisioned. Opp. 15. They are neither a newly-adopted exception to the PCB ban, since storage for reuse has been permitted for nearly 20 years, nor an EPA decision to decline to make an exception to the ban. Should the standard of review of these new rules depend on whether a challenge contends that these new conditions on storage are too tight or too loose? Or on the identity of the petitioner? We submit that § 19(c)(1)(B)(i)'s simple directive that EPA must justify whatever rule it issues under § 6(e) by a showing of substantial evidence is the only workable test for assessing the validity of the rule under TSCA's judicial review provision – regardless of whether the rule authorizes or restricts the use of PCBs.

We can find no other case, and the court below and Respondent cite none, where a court has applied a bifurcated standard of review to an agency rule depending on the nature of the rule being challenged and the perceived interest of the petitioner. There is simply no justification for intuiting such a "congressional intent" when the statutory text and legislative history are both clear and to the contrary.

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ban on PCB's – is nothing more than a straw man. Opp. 11-13. The petitions for review below were *not* challenges to the denial of rulemaking petitions; instead, they were plain challenges to the text of the final rule under the substantial evidence standard.

CONCLUSION

For the reasons set forth in the petition and herein, the joint petition for a writ of certiorari should be granted.

Respectfully submitted,

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